Case Number: 3200052/2019

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EMPLOYMENT TRIBUNALS

Claimant: **Mr N Javaid**

Respondent: **Fitch Ratings Limited**

Heard at: **East London Hearing Centre** **On: Wednesday 3 April 2019**

Before: **Employment Judge Jones**

Representation

Claimant: In Person

Respondent: Mrs C Ashiru (Counsel)

JUDGMENT having been sent to the parties on 13 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Tribunal heard evidence from the Claimant in support of his case that the Tribunal had jurisdiction to hear his complaint of wrongful dismissal.

2. After hearing evidence from the Claimant and considering the documents, the Tribunal came to the following conclusions:

Relevant Facts

3. The Claimant was employed from 6 July 2015. He worked for the Respondent as a US Public Finance Data Specialist, based at the Respondent's offices in London.

4. As a regulated business, the Respondent makes compliance with the Code of Conduct an important part of its business. In the Claimant's contract there is an express provision which makes it clear that compliance with the Code of Conduct and other related policies is fundamental and that employment is conditional on such compliance. The Claimant attested to the Code in February 2016.

5. The Respondent's Code of Conduct includes the following statement:

> *"Fitch Ratings expects its employees to act in accordance with the highest standards of personal and professional integrity and to comply with all applicable laws, rules and regulations, and all policies and procedures adopted by Fitch Ratings that govern the conduct of Fitch Ratings employees. Each employee is personally responsible for maintaining the highest levels of integrity to preserve the trust and confidence of global investors."*

6. On 22 April 2016, the Claimant contacted HR and asked the Respondent to support him in his application for a Tier 2 visa. Subsequently, on 3 June, the Respondent wrote to the Claimant to confirm that it was pleased to sponsor his application for Indefinite Leave to Remain in the UK. The Respondent also confirmed that it would cover the cost of the Application fee, together with any related costs, if the Claimant remained in employment up to 24 months after receiving his visa.

7. The Claimant's application was progressed and submitted on 9 June by the immigration specialist engaged by the Respondent.

8. The Tribunal finds that it is likely that the Claimant received the letter of refusal from the Home office on or around 10 June 2016. The letter was in the hearing bundle and was dated 9 June. It informed the Claimant that his application for indefinite leave had been unsuccessful. He was informed that he could apply for an administrative review of the decision. In the Reasons for Decision document attached to the letter, it stated that the Home Office had contacted HMRC to confirm his earnings. The Claimant had also been interviewed as part of the process. The letter stated that based on all the information it had, the Secretary of State was satisfied that the Claimant deliberately claimed higher earnings to the Home Office for the purposes of obtaining leave to remain. The Secretary of State considered that it would be undesirable for the Claimant to remain in the UK since he had been deceitful or dishonest in his dealings with HMRC and UK Visas & Immigration by failing to declare his self-employed earnings to HMRC at the time and by falsely representing his self-employed income to obtain leave to remain in the UK.

9. On 10 June 2016 the immigration specialist engaged by the Respondent informed it that the Claimant's application had been refused. As a result, the Claimant's pay was frozen by the Respondent on 10 June 2016. The Respondent also contacted the Claimant to arrange to speak to him to understand the situation. The Claimant submitted a fresh application to the Home Office on 13 June and informed the Respondent of that.

10. The Claimant did not provide the Respondent with a copy of the 9 June letter from the Home Office until 15 June at HR's request. At that time, he only gave the Respondent a copy of the first page. The Respondent requested the rest of the letter and the enclosed documents but those were not provided until 23 June 2016.

11. In the light of the contents of that letter, the Respondent invited the Claimant to a meeting to be held on 30 June in order to gather more information in relation to these

matters. In the interim, following submissions made by the Claimant and because the Respondent had not yet made a decision on the Claimant's continued employment; his pay was reinstated on 17 June.

12. The Claimant was told that after the meeting on 30 June, the Respondent would need to make a decision in relation to the Claimant's continued employment.

13. It is the Respondent's case that prior to the meeting it reviewed all of the relevant documentation in relation to the Claimant's application and refusal.

14. The Claimant met with the Respondent's senior compliance officer and a representative of HR on 30 June 2016.

15. The Claimant indicated in the meeting that the Respondent should not have taken the Home Office's decision as the final decision as the Home Office was not a court of law. He stated that he was not a criminal because if he had been, his application would have been rejected outright. He was asked to comment on the Home Office letter. He confirmed that he was not a dishonest or deceitful person.

16. He debated whether self-employed earnings had to be reported to HMRC and stated that he had followed his accountant's advice. His accountant had later admitted to him that they had made an error. He also confirmed that he had signed a declaration prior to his accountant submitting documents to the Home Office to say that it was all true and correct. He was asked in the meeting whether he considered that it was dishonest that he had given this declaration that the documentation was true and correct knowing that in fact not all of his earnings had been reported. The Respondent recorded that the Claimant confirmed that viewed in this way it would be dishonest.

17. They discussed the delay in the Claimant producing the complete letter from the Home Office to his employers, especially when they were sponsoring the application and when his continued employment was dependent on his status in the country.

18. The Claimant provided the Respondent with a letter from his accountant, Robson Morrow, in which it confirmed that it took responsibility for the filing of inaccurate information to HMRC and that it was sorry for the inconvenience caused. Also at the meeting he gave the Respondent a copy of a letter dated 25 May 2016 from HMRC in which it confirmed that the Claimant's tax affairs were out of date and that there was no outstanding liability due at that date. HMRC indicated that it would send the Claimant a cheque for £30 to say sorry for the worry and distress caused to him and to cover the cost of his telephone calls to it. The Respondent considered both letters.

19. The Claimant confirmed in the meeting that he was familiar with the Code of Conduct and that he had reviewed it when he started his employment but had not looked at it recently. He was reminded of the annual certification process and that he had attested to the Code in February 2016. After he was reminded of the passage above, the Claimant confirmed that he had not acted in accordance with the Code of

Conduct. At the end of the meeting the Compliance officer asked the Claimant whether he now understood the Respondent's concerns. The Claimant stated that he was still unsure which led to a further explanation from the Respondent that whilst the Home Office and the UK Visas & Immigration were not courts of law, they were government bodies and there were rules and regulations that the Respondent was expected to adhere to. He was told that given the Respondent's regulated status, it was not possible for it to simply ignore the findings of deceit and dishonestly in the Home Office letter.

20. The Respondent was clear in the meeting with the Claimant that its decision would be based upon the findings set out in the Home Office letter and the Respondent's status as a regulated business, rather than on the basis of the initial application for Indefinite Leave to Remain having been refused or the Claimant's right to work status.

21. The Respondent concluded that the Claimant had failed to act in accordance with the Code of Conduct in relation to his historic dealings with HMRC and the UK Visas & Immigration department. The decision was that the Claimant's employment should be terminated and this was communicated to the Claimant on the day.

22. The reason for his dismissal was described in a letter to him dated 5 July 2016 as breach of the Respondent's Code of Conduct and because of the Home Office's decision that the Claimant had been deceitful and dishonest in his dealings with HMRC.

23. The Claimant's effective date of termination was 30 June 2016.

24. The letter recorded the contents of a letter from the Home Office sent to the Claimant in response to his application for Indefinite Leave to Remain in the UK. It quoted the Home Office letter as follows: - *"You have been deceitful or dishonest in your dealings with HMRC and UK Visas and Immigration by failing to declare your self-employed earnings to HMRC".*

25. The letter referred to Section 1.1 of the Respondent's Code of Conduct and stated that adherence to the Code was a condition of the Claimant's employment.

26. The documents in the bundle show that it is likely that the Claimant consulted solicitors before his dismissal. There was an email from Landau Law dated 15 June which attached a link to a questionnaire which the Claimant was asked to fill if he wanted Mr. Landau to properly advise him. In the email, Mr. Landau advised him that if he wished to make a claim in the employment tribunal, there is a strict time limit of three months less one day from the termination of employment to commence the process. He was advised that in the case of discrimination, the time limit is three months less one day since the discriminatory act. He was also informed that the tribunal would allow this time to be extended only in exceptional circumstances. The Claimant's evidence was that he did not actually see or speak to Mr. Landau but that this email had been sent to him after he spoke to the receptionist at the firm. He did not complete the questionnaire and did not go to see that solicitor.

27. The Tribunal finds that the three-month time limit is clearly set out in the email. It did not specify a type of complaint but simply referred to *'claims in the employment tribunal'.*

28. The Claimant also consulted another solicitor on the 1 July, the day after the dismissal meeting. He took with him all the letters he had at the time. He was not yet in possession of his dismissal letter but he knew that his dismissal on 30 June had been without notice.

29. It was the Claimant's evidence in the hearing that he did some research and found out that wrongful dismissal cases can be brought within 6 years of termination of employment. It was not clear to the Tribunal where he got that advice from. It was not his case that he was told this by Landau law or the solicitors he spoke to on 1 July.

30. In his Grounds of Claim the Claimant referred to seeing what he described as 'a host' of solicitors in 2016 and that he had been asked about his notice period, length of service and pay scale. He also made telephone calls to lawyers' offices, including two calls to Hallens solicitors. He had been primarily seeking advice on bringing an unfair dismissal claim. It is likely that he informed the solicitors that he had not been paid any notice pay as pay had been an issue for him at the end of his employment. He told that Tribunal that he was advised by solicitors that he had limited chances of success although he did not specify by whom. He did not go to the Citizens Advice Bureau. He considered that his case was complex and that the solicitors had not understood the complexity of the matter.

31. The Claimant stated that contrary to what he said in the 29 June meeting, he had not been familiar with the Code of Conduct and only read it when he accidentally found a copy on the internet after his dismissal.

32. The Claimant made a Subject Access Request (SAR) to the Home Office on 21 April 2017. The Tribunal did not have sight of this but takes this from the Claimant's Grounds of Claim document. The results of that SAR did not provide the Claimant with the information he sought so he made another SAR which resulted in his getting information on 25 September 2018 which he found more useful. He concluded from the results of the second SAR that HMRC had given incorrect information to the Home Office which had led it to make the decision it did.

33. The Claimant made a SAR to HMRC also. He obtained a letter from HMRC dated 8 October 2016. This had been sent to the Tribunal with the claim form. In the letter, HMRC apologised to the Claimant for sending the wrong employment figures to the Home Office for some years. It confirmed that the Claimant had been compliant in relation to his income tax affairs and that HMRC had nothing on its records to lead it to believe that the Claimant was deceitful or non-compliant.

34. The Claimant next did a Data Subject Access on the Respondent on 29 October 2018. The Respondent provided the Claimant with all the relevant data.

35. The Claimant contacted ACAS on 25 December 2018 to start the conciliation process. The Conciliation period ended on 27 December 2018. The Claimant's claim of wrongful dismissal was issued in this Employment Tribunal on 7 January 2019.

Law

36. The Employment Tribunal's jurisdiction to hear complaints of breach of contract is contained in the Employment Tribunals [Extension of Jurisdiction] (England and Wales) Order 1994. Article 7 states that an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or (Article 7(C)) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the relevant time limit, within such further period as the tribunal considers reasonable.

37. In his Grounds of Claim the Claimant's case was that he issued his ET1 when he did, because he got incorrect legal advice. He also submitted that he only received the results of his Subject Access Request (SAR) to UK Visas and Immigration (UKVI) on 25 September 2018 and the letter from the HMRC on 8 October 2018 and that time should start to run from those dates. Lastly, he submitted that it had therefore not been reasonably practicable for him to have issued in time.

38. In addition, at the hearing the Claimant submitted that he had not known that he could claim wrongful dismissal until much more recently as the solicitors had only advised him of unfair dismissal. He submitted that he had not had an opportunity to confirm the minutes of the dismissal meeting and that it was only when he received the results of the Subject Access Request that he had confirmation of his belief that he had been victimised and therefore, time should start to run from there.

39. The Respondent submitted that the Claimant's claim had been issued outside of the time limit. It submitted that time should start to run from the date of dismissal since the Claimant always knew that he did not agree with his dismissal and considered that the Respondent had been wrong to rely on the Home Office's decision letter in dismissing him. The Respondent submitted that it had been reasonably practicable for him to have issued in time. The Respondent asked the Tribunal to dismiss the claim.

How does a tribunal decide whether it was reasonably practicable to present a claim in time? And if it was not, what is a reasonable time thereafter?

40. The law states that the question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. In the case of *Walls Meat Co Ltd v Khan* [1979] ICR 52 CA Lord Denning explained the test like this:

> *'It is simply to ask this question: had the man just because or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If*

he or his advisers could reasonably have been so expected, it was his all their fault and he must take the consequences '.

41. The matter was considered in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945. In that case May LJ reviewed the authorities and stated as follows*:*

" 'reasonably practicable' means more than merely what is reasonably capable physically of being done……. Perhaps to read the word "practicable" as the equivalent of "feasible" ……. And to ask colloquially and untrammelled by too much legal logic -- was it reasonably feasible to present the complaint to the employment tribunal within the relevant three months?"-- Is the best approach to the correct application of the relevant subsection".

42. In the case of *Schulz v Esso Petroleum Ltd* [1999] IRLR 488 it was stated by the Court of Appeal that the tribunal must answer this question against the background of the surrounding circumstances and the aim to be achieved. This is what the "injection of the qualification of reasonableness" requires.

43. Where a claimant claims to be ignorant of the law. The principle in the case of *Dedman v British Building and Engineering Appliance Limited* 1974 AER 524 is that in a case where a claimant claims to have been ignorant of their right to issue the claims within time, the questions to be asked would be, what were the claimant's opportunities for finding out that he had rights, whether he took those opportunities and if not, why not and whether he had been misled or deceived. The court held that if there had been an acceptable situation for the continuing ignorance of the claimant of the existence of his rights then it would be unjust to ignore it and that may make it unpracticable for him to have issued his claim in time. If a claimant did not know of his right to claim, the question for the tribunal would be whether it reasonable for him not to have known of that right?

44. In the case of *Walls Meat Company Limited v Khan* 1979 ICR 52, Lord Justice Scarman indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. He outlined similar questions as had been discussed in *Dedman* as the ones that it would be appropriate for the tribunal to consider. Those included whether the claimant had been misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it relying on the maxim "ignorance of the law is no excuse". The court confirmed that the word "practicable" was there to moderate the severity of the maxim and to require an examination of the circumstances of the claimant's ignorance.

45. In its commentary, *Harvey* states that while the state of mind is to be taken into account, it is clear from the above that his mere assertion of ignorance either as to the right to claim, or the time of it, or the procedure for making the claim, is not to be treated as conclusive; the Tribunal must be satisfied as to the truth of the assertion and, if it is, it must be satisfied that the ignorance in each case was reasonable. In later cases, the courts held that the claimant ought to have known of his right to claim (*Porter v Bandidge Limited* 1978 ICR 943). It is becoming more difficult for an

employee to plead such ignorance successfully given the widespread knowledge of employment rights in society and the accessibility of information on the internet. In the case of *Marks & Spencer PLC v Williams-Ryan* 2005 IRLA 562, the claimant knew of the right to claim unfair dismissal but pleaded that she was ignorant of the time limit concerned. The tribunal accepted that the claimant had been given post termination advice by her employer and that advice had been incomplete as although it mentioned the right to bring a claim to an employment tribunal, it did not mention the time limit. The tribunal held that the information given by the employer must have misled the employee and had contributed to her missing the time limit. This was because of the particular facts of the case.

46. Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claimant time, the tribunal must then go on to consider whether it was presented within a reasonable time thereafter. In making this assessment the tribunal must exercise its discretion reasonably and with due regard to the circumstances of the delay. The tribunal has to look at the particular circumstances of each case in coming to its decision.

47. In the case of *James W Cook & Co. (Wivenhoe) Ltd v Tipper* (1990) IRLR 386 – a period of two weeks was held to be reasonable and in the case of *Walls Meat* referred to above, four weeks was held to be reasonable on the particular facts of that case.

Decision

48. I find that the Claimant always believed quite strongly the Respondent should not have accepted the Home Office's decision on his honesty and should have conducted its own investigation.

49. However, it was not clear to the Tribunal, given his conviction that he had been wrongly dismissed and given that the email from Landau Law advised him of the three-month time limit, why he did not issue his claim in time. It is possible that he was either wrongly advised by the solicitors from whom he sought advice on 1 July or he failed to follow the advice given. It is also the case that at the time, the Claimant was focused on bring a complaint of unfair dismissal. That was until he was told that he did not have sufficient service to enable him to make that claim. A complaint of unfair dismissal would also have had a three-month time limit in which he would have had to issue a complaint at the Employment Tribunal.

50. The Claimant did quite a lot of research to prepare for today's hearing and before issuing his claim. By the time he issued the claim on 7 January 2019, the Claimant was aware that the claim had been issued outside of the time limit and he made written legal submissions (which were attached to his claim) in which he sought the Tribunal's leave to continue with his claim even though it was issued out of time. The Claimant confirmed today, however, that he had not sought legal advice in drafting his claim or in relation to today's application.

51. I find that similarly, that it was feasible for the Claimant to have done his own research at the time of his dismissal and found out about his right to bring a complaint of wrongful dismissal. Had he done so, he would have issued his complaint within the statutory time limit.

52. It was difficult for the Tribunal to make sense of the Claimant's contact with solicitors as his evidence was inconsistent in that regard. Having seen solicitors on the day following his dismissal, the Claimant did not instruct them to act for him. Having contacted Landau Law before his dismissal, he did not go back to them. If finances were an issue for him, he never sought advice from the Citizens Advice Bureau or similar organisation. He did not seek advice or assistance from any solicitors or advisers in drafting the ET1 or in preparing for today's hearing.

53. In this Tribunal's judgment, if the Claimant was ignorant of his right to claim wrongful dismissal, it was not reasonable for him to hold that belief. He sought advice from solicitors. It is reasonable to expect that in doing so, he would seek advice on any claim that he could bring against the Respondent in respect of his dismissal. He had ample opportunity to do so. He confirmed in evidence that solicitors asked him for her termination date and details of notice. If he provided that information to them and they appreciated that he was dismissed and not paid notice pay then it is highly unlikely that a competent employment solicitor would not have advised him that he had the right to issue a claim for wrongful dismissal.

54. If the Claimant was wrongly advised, his claim is against the solicitor who did so and not the Respondent. The Tribunal is unable to say that the Claimant was wrongly advised as the Claimant was vague in his evidence as to the advice he got from lawyers and it was inappropriate to ask. He had seen one solicitor on 1 July and according to him, spoken to a 'host' of solicitors. It was not clear whether those conversations took place on the telephone, in person or how much detail or how far those conversations went or what advice he was given.

55. The Claimant was not misled or deceived by anything the Respondent did or failed to do in deciding when to issue his claim.

56. It is this Tribunal's judgment that given that he accessed competent professional advice and was capable of doing research on the internet as he did when he issued the claim, it was not reasonable for the Claimant to be ignorant of his right to bring a complaint of wrongful dismissal after July 2016.

57. The second aspect of the Claimant's submissions to the Tribunal was that time should start to run from the date of receipt of the letter from HMRC dated 8 October 2018 and that therefore he brought his complaints in time.

58. In this Tribunal's judgment, the letter of 8 October did not inform the Claimant of something new. The contents of the letter was not something that the Claimant had been unaware of before. Instead, it confirmed the Claimant's belief, which he had submitted at the meeting with the Respondent on 30 June 2016, that he had not done anything wrong.

59. In the minutes of the meeting of 30 June 2016, he is recorded as having said that the letter from HMRC confirmed that there was no additional liability on his part, that he followed his accountant's advice and that he had done nothing wrong.

60. In his written submissions for today's hearing, he stated that the Respondent failed to look properly at the documentation that he had submitted for that meeting which included an HMRC letter of 25 May 2016 and the letter from his accountants, Robson Morrow dated 10 June 2016. Also, the Respondent had not accepted his explanation about the circumstances pertaining to his tax returns prior to the Home Office's decision of 9 June 2016. The Claimant submitted that the Respondent should have accepted those documents as proof that he had not been dishonest, that he had done nothing wrong and his employment should have continued.

61. The Tribunal finds that the letter of 8 October reinforced the Claimant's position as in it HMRC stated that the Claimant had been complied in his tax affairs and that they did not have any evidence on which to base a belief that he was deceitful or non-compliant.

62. This confirmed the Claimant's position that he had done nothing wrong and that the Home Office's decision had been incorrect. It had been alluded to in the letter of contradicted the Home Office's decision. It is not new information. It confirms the information that already existed and which the Claimant had submitted to the meeting on 30 June in the form of the letter from HMRC dated 25 May 2016 and the letter from his accountant dated 10 June.

63. It is also possible that the Claimant could have obtained that letter from HMRC in July 2016.

64. The Tribunal was not told why the Claimant did not write to HMRC in July or August 2016 to get information that would clear his name. It would have been possible to follow up the letter from HMRC dated 25 May. The Claimant had always been aggrieved by this and it was not clear why he waited until 2018 before writing to HMRC to get that written confirmation.

65. The Tribunal's main judgment in relation to the issue of when time starts to run is that the Claimant knew at the time of his dismissal that he did not accept that it was fair. He disputed whether the Home Office's decision had been made correctly, he disputed that HMRC had made the correct decision and he clearly felt that the Respondent should have made its own enquiries as to his honesty.

66. The letter of 8 October did not change the Claimant's position on his dismissal. It did not inform him of something new. It was not on receipt of that letter that the Claimant realised that he had a claim of wrongful dismissal against the Respondent. Since the date of his dismissal he knew that he had the possibility of a legal claim and that was why he sought legal advice from solicitors on his dismissal. The Claimant did not have good reason for leaving it for two years before doing so.

67. The letter of 8 October 2018 was written by HMRC following communication from the Claimant. If he wanted further evidence that his dismissal had been wrong, he could have asked HMRC to write the letter of 8 October earlier. There was no reason to delay until that time before writing that letter. It was not necessary to wait for that letter to issue proceedings. The Claimant's right to claim arose up on his dismissal and not on the letter of 8 October.

68. There was no reason for the Claimant to have waited for the results of his SARs either from the Home Office or from the Respondent before issuing his claim. In making those SARs the Claimant was gathering evidence for his case. It is this Tribunal's judgment that those were done to strengthen or reinforce the claim rather than to see if he had a claim.

69. The Claimant was gathering evidence of his innocence and the other process followed by the Respondent in dismissing him so that he could challenge that process in a court hearing but the documents that he obtained from the Home Office and from the Respondent did not reveal the cause of action against the Respondent. That had been known by the fact of his summary dismissal.

70. It is therefore this Tribunal's judgment that time starts to run from the date of the dismissal of 30 June 2016 rather than from 8 October 2018.

71. Considering all of the above, it is this Tribunal's judgment that it was reasonably practicable for the Claimant to have been given correct and accurate legal advice on his right to claim wrongful dismissal at the time of his dismissal as he believed that the Respondent had made a decision to dismiss him in breach of his contract and by relying on incorrect information from the Home Office. It was also his belief that the Respondent had failed to carry out its own investigation into the events that caused the Home Office to come to its decision that he had been dishonest and that therefore his dismissal was wrong. None of those matters changed between 2016 and 2018. That was the situation in 2016 when he was dismissed.

72. It was reasonably practicable for the Claimant to have sought and obtained correct and accurate legal advice on his right to claim wrongful dismissal or to have got that information as a result of his own personal research and to have issued his claim within the statutory time limits.

73. In this Tribunal's judgment, there was no practical impediment to the Claimant issuing his claim within the statutory 3-month time limit. In this Tribunal's judgment, it was reasonably practicable for the Claimant to have issued his claim within the statutory time limit. As he was dismissed on 30 June 2016 and time starts to run from that date, the claim should have been issued by 29 September 2016. The claim was not issued until 7 January 2019.

74. The Claimant did not issue his claim in time but issued his claim over two years later following his dismissal.

75. In this Tribunal's judgment, the Tribunal has no jurisdiction to consider this claim and it is dismissed.

Costs

76. After the Tribunal had given its judgment to the parties on the substantive issue above, the Respondent indicated that it wished to make an application for a costs order against the Claimant.

77. The Respondent handed to the Tribunal a letter dated 1 April 2019 written by its solicitors to the Claimant.

78. The letter was a long letter in which the Respondent's solicitors explain to the Claimant why he his claim no reasonable and that they were concerned that he was bringing the claim unreasonably. He was advised to seek legal advice.

79. In the letter the Respondent's solicitor discussed the points made by the Claimant in his Grounds of Claim as reasons for issuing the claim late. He was advised that he should withdraw his claim and that if he did so prior to the preliminary hearing on 3 April the Respondent would not seek any costs from him.

80. He was then given a costs warning. He was referred to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the powers the Tribunal has under those Regulations to order one party to pay another party's costs. The solicitor stated that the Respondent considered that the Claimant would be acting unreasonably if he did not withdraw his claim and that if he did not do so, it would ask the Judge at the end of the preliminary hearing to order him to pay costs, if the hearing went as the Respondent suspected it would.

81. The Claimant was informed that as of the date of the letter, the Respondent's costs were approximately £9,100 and that it was likely that a further £3,800 would be incurred up to the hearing. The Respondent instructed Counsel to attend the hearing on its behalf. The Claimant was advised that the contents of the letter would be drawn to the attention of the Court if appropriate. The letter was headed 'Without Prejudice save as to Costs' and advised him that he should seek advice from an independent legal advisor regarding its contents.

82. The Respondent also referred to an earlier letter that it wrote to the Claimant on 25 March in which, mindful of the costs that would likely be incurred in defending this matter, even though it was of the belief that the Claim had no prospects of success, if offered to pay the Claimant his notice pay as a way of resolving his complaints. The Claimant responded with a counter-offer.

83. The Tribunal was informed that the Respondent sent the Claimant another letter yesterday with a statement of its costs.

84. The Tribunal took evidence of the Claimant's means. He had started self-employment in February. His business is to purchase items at a supermarket and sell

them on eBay but that it had so far not been very successful. He confirmed that he was married with a baby. His wife had attended the hearing with their baby. There was another child on the way. He confirmed that the family were in debt due to loans from friends and credit cards. In addition, they live in rented accommodation and did not have a mortgage.

85. The Claimant is a graduate in Applied Accounting but there are visa complications to his search for employment. He would need to be sponsored by another employer to obtain a work visa. The family run a car and take loans for essential living costs from friends and family.

Law and submissions

86. Rule 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states that a tribunal may make a costs order and shall consider whether to do so where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way in which the proceedings has been conducted; or any claim or response had no reasonable prospects of success.

87. It was submitted that it was unreasonable for the Claimant to have continued with this claim when he had been told that there was no reasonable prospects of establishing that the employment tribunals had jurisdiction to hear it, given the length of the delay.

88. It was submitted that in the light of the offer to pay his notice pay which had been made before the Respondent incurred the costs of instructing solicitors to prepare its Response to the claim and the clear explanation and information given to him in the letter dated 1 April in particular; it was unreasonable and vexatious for him to have continued with the claim and a costs order should be made.

89. The Claimant confirmed that he had received and read the Respondent's letters. He confirmed that he had asked for extensions of time in relation to some of the deadlines that the Respondent had set and he agreed that his contract gave him an entitlement to one month's notice.

90. He stated that he had tried to get in touch with the Free Representation Unit (FRU) for assistance with his case but that had been unsuccessful. Solicitors had quoted him £3,000 as an estimate of the costs of taking his case forward.

91. In the case In *Power v Panasonic UK Limited* EAT 0439/04 Clarke J succinctly described the exercise to be undertaken by the Tribunal as, (referring to an earlier set of rules), a two-stage exercise. First, has the paying party acted unreasonably, vexatiously, abusively, disruptively, or brought a claim that was misconceived? If so, the second stage is that the Tribunal must ask itself whether to exercise its discretion by awarding costs against that party.

92. In addition, the Tribunal has a discretion, not an obligation, to take into account means to pay. This was considered in the case of *Jilling v Birmingham Solihull Mental Health*

NHS Trust EAT 0584/06. That case said was that if we decide not to take into account the party's means to pay, we should explain why, and if we decide to do so, we should set out our findings about the ability to pay, what impact that has had on our decision whether to award costs and if so, what impact means had on our decision as to how much those costs should be

Decision

93. In this Tribunal's judgment, the Claimant has acted unreasonably and carelessly in the way that he has conducted this litigation. He failed to consider or obtain advice from anyone on the prospects of his claim succeeding.

94. The Claimant was aware at the time he issued his claim that it was issued outside of the statutory time limits which is why he attached legal submissions to his claim form. Those submissions were not on the point but this demonstrates his awareness from the beginning that there were procedural issues with his claim.

95. The Respondent's correspondence to the Claimant was clear on is prospects of success. The Claimant did not take advice on the letter of 1 April when it clearly stated the law, his options and the likely outcome of this hearing. The Claimant was unable to say, if he came to another conclusion, what he based such a conclusion on.

96. In this Tribunal's judgment, the answer to the first part of the test is that the Claimant conducted this matter unreasonably in continuing with it after receipt of the clear letter of 1 April which informed him that there were no reasonable prospects of success and gave explanations as to why that was the case.

97. In this Tribunal's judgment, it is appropriate that the Claimant pay towards the costs incurred by a Respondent who followed its process in coming to its decision to dismiss the Claimant. The Claimant was invited to the meeting on 30 June and told the matters that were to be discussed at that meeting. He was told that depending on the outcome of the meeting, the Respondent may decide to terminate his employment. The Claimant sought legal advice on his employment before his contract was terminated.

98. The fact that the claim was issued outside of the statutory time limits was not due to any action or failure to act by the Respondent. The Respondent was clear in the letter of 1 April that there was no reasonable prospect of success. Despite being clearly advised to seek legal advice before deciding whether to proceed to the hearing, the Claimant failed to do so. This was not simply a matter of not having resources for expensive solicitors as he failed to attend at the Citizens Advice Bureau either. The Claimant does not appear to have faced the information contained in the Respondent's letter of 1 April and really considered whether he should continue on and if so, on what basis. He was unable to tell the Tribunal today on what basis he had decided to carry on. This was even more important given that at the time he issued his claim in January, he was aware that it was out of time.

99. It is this Tribunal's judgment that the Claimant should pay towards the Respondent's costs.

100. The Claimant is a person of severely limited means. The Claimant is not employed and has people who depend on him, including an unborn child. The family are already in debt and at present, have no prospect of paying those debts off.

101. However, it is not my judgment that he is a man of straw. As the Claimant is a graduate it is hoped that he can secure gainful employment soon. In the interim, it is this Tribunal's judgment that his finances are dire.

102. Nevertheless, it is this Tribunal's judgment that his decision to continue this litigation to this hearing without any real expectation that he was likely to succeed and with the awareness of the Respondent's assessment of the case as set out in its letter of 1 April which he had not rebutted, was unreasonable and vexatious.

103. The Claimant had no reasonable prospect of success. To continue with it after receipt of the letter dated 1 April was unreasonable.

104. It is this Tribunal's judgment that taking into account the Claimant's means, it is appropriate that he pay £500 towards the Respondent's costs and that is my order.

105. The Claimant is ordered to pay £500 towards the Respondent's costs of defending these proceedings up to today's hearing.

Employment Judge Jones

8 October 2019